



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Review no: **A53315/2023**

In the matter between:

THE STATE

and

GABA OCTAVIA JOJO

Coram: Mossop J and E Bezuidenhout J

Received: 19 December 2024

Delivered: 23 December 2024

ORDER

The following order is granted:

The conviction of the accused and the sentence imposed upon him on 8 November 2023 are set aside.

JUDGMENT

MOSSOP J (E BEZUIDENHOUT J CONCURRING):

[1] This matter comes before me on review from the Kokstad magistrate's court.

[2] Mr Gaba Octavia Jojo (Mr Jojo) stood trial in that court on 20 September 2023, charged with contravening s 120(3)(a) of the Firearms Control Act 60 of 2000 (the Act). It was alleged that he had unlawfully and intentionally pointed a firearm, an antique firearm, or an air gun, and, more specifically, a 'black gun,' at one Bulelewa (no surname specified). He pleaded guilty when the charge was put to him but after questioning by the magistrate before whom he appeared, the plea was changed to one of not guilty.

[3] The basis for the recordal of the plea of not guilty was that Mr Jojo stated that he possessed a toy firearm.

[4] A trial was subsequently commenced on 8 November 2023, at which the State called a single witness. She was a Ms Bulelwa Mazomba (Ms Mazomba), who is apparently the person identified as being 'Bulelewa' in the charge sheet. She testified that Mr Jojo had pointed a firearm at her. She was cross examined by Mr Jojo, who conducted his own defence, and who put it to her that he possessed but a toy firearm. Ms Mazomba testified that Mr Jojo had not said that it was a toy firearm, but she did not dispute that it was, indeed, a toy firearm. The State led no other evidence and closed its case.

[5] Mr Jojo elected to testify and took the oath. He was first questioned by the court and from this questioning it became apparent that Mr Jojo still contended that he did not possess a real firearm but only had a toy firearm. The following interaction between the magistrate and Mr Jojo is illustrative of his defence, when Mr Jojo stated the following:

'They did not want to proceed to the police station, instead they wanted to open the backpack forcefully. They did so, then inside that backpack there was this toy gun and they assumed that it was a real firearm.'

Mr Jojo did refer to a firearm when cross examined by the public prosecutor, but he did not thereby abandon his version that it was a toy.

[6] After testifying, Mr Jojo closed his case. The court thereafter convicted him and sentenced him to 6 months imprisonment which was wholly suspended for three years on certain conditions. The sentence imposed upon Mr Jojo rendered the matter subject to automatic review by this court.

[7] Mr Jojo was charged with contravening s 120(3)(a) of the Act. which reads as follows:

‘It is an offence to –

(a) cause bodily injury to any person or cause damage to property of any person by negligently using a firearm, an antique firearm or an airgun;’

[8] The section thus contemplates a physical injury or damage to property caused by the negligent use of a firearm, an antique firearm or an airgun. A firearm is defined by the Act to mean a:

‘(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);

(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);

(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or

(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include a muzzle loading firearm or any device contemplated in section 5.’

[9] Ms Mazomba made no mention in her evidence of sustaining any bodily injury or of any damage to property being occasioned by Mr Jojo. But, perhaps more importantly, the State led no evidence to establish that what Mr Jojo possessed was a firearm as defined in the Act. A toy firearm does not fall within the definition of ‘firearm’ mentioned above.

[10] By rights, Mr Jojo should not have been put to his defence and should have been discharged at the end of the State case because the State did not establish

that he possessed a firearm. He was not discharged. Significantly, he was not charged with unlawfully possessing a firearm. He maintained throughout the trial that it was a toy firearm.

[11] No authority is needed for the proposition that the State bears the onus of proving the guilt of the accused beyond reasonable doubt. It was obvious from the outset that Mr Jojo's version was that he possessed a toy gun. No attempt was made to prove that it was, to the contrary, a firearm as contemplated by the Act.

[12] In my view, the guilt of Mr Jojo was not established, and he ought to have been acquitted at the closure of the State's case.

[13] I would accordingly propose the following order:

The conviction of the accused and the sentence imposed upon him on 8 November 2023 are set aside.

MOSSOP J

I agree

E BEZUIDENHOUT J